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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 423

FRANK H. COONEY, AS GOVERNOR OF THE STATE OF MONTANA, ET AL., ETC., APPELLANTS,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

FILED SEPTEMBER 27, 1934.

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INDEX

	Original	Print
Record from D. C. U. S., District of Montana	1	1
Caption (omitted in printing)	1	
Bill of complaint	3	1
Exhibit "A"—Chapter 174 of Laws of Montana of 1933	12	8
Exhibit "B"—Act amending Chapter 174 of laws of 1933	13	10
Amendment to bill of complaint	16	11
Answer	18	12
Amendment to answer	27	18
Opinion, Bourquin, J.	29	19
Dissenting opinion, Garrecht, J.	34	23
Findings of fact, conclusions of law and decree	36	23
Petition for appeal	41	26
Assignment of error	43	27
Order allowing appeal	51	29
Citation and service (omitted in printing)	54	
Bond on appeal (" " ")	60	

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—5708-C

	Original	Print
Stipulation re approval of statement of evidence	63	30
Order approving statement of evidence	65	31
Statement of evidence	67	32
Caption	67	32
Testimony of R. M. Morris	68	32
Plaintiff's Exhibit No. 1—Map showing toll circuits	73-A	38
Plaintiff's Exhibit No. 2—Chart showing business affected by act	75-A	40
Stipulation as to transcript of record	85	45
Clerk's certificate (omitted in printing)	87	
Statement of points to be relied upon and designation as to printing record	88	47

[fols. a-1] [Caption omitted]

[fols. 2 & 3]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

In Equity

No. 1495

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

FRANK H. COONEY, as Governor of the State of Montana; RAYMOND T. NAGLE, as Attorney General of the State of Montana; and JAMES J. BRETT, as Treasurer of the State of Montana, Defendants

BILL OF COMPLAINTS—Filed Jan. 23, 1934

The Mountain States Telephone and Telegraph Company, a corporation, plaintiff, brings this, its bill of complaint against the defendants, Frank H. Cooney, as Governor of the State of Montana, Raymond T. Nagle, as Attorney General of the State of Montana, and James J. Brett, as Treasurer of the State of Montana, and, complaining of the defendants, says:

1. The plaintiff, The Mountain States Telephone and Telegraph Company, is a corporation duly created, organized and existing under and by virtue of the laws of the State of Colorado, with its principal office in the City and County of Denver, and State of Colorado, and is a citizen and resident of the State of Colorado, and is duly and lawfully authorized and qualified under the laws of the State of Montana, to do, and is now doing, a general telephone business within the State of Montana, and it now owns and operates, and at all times mentioned herein has owned and operated, a telephone system in the State of Montana, with all the proper appliances and appurtenances necessary to [fol. 4] the proper operation of such a system, and does

now, by said system, furnish telephone service of an interstate and intrastate character to the general public in the State of Montana.

2. The defendant, Frank H. Cooney, is the duly elected, qualified, and acting Governor of the State of Montana. The defendant, Raymond T. Nagle, is the duly elected, qualified, and acting legal advisor of the Governor of the State of Montana, and of the Treasurer of the State of Montana, and is the Attorney General of the State of Montana. The defendant, James J. Brett, is the duly elected, qualified, and acting Treasurer of the State of Montana. Each and all of the above-named defendants are citizens and residents of the State of Montana, and each and all of them are residents within the District of Montana.

3. This is a suit of a civil nature in equity, and is brought for the purpose of enjoining the enforcement of that certain statute passed by the Legislature of the State of Montana, and approved by the Governor of the State of Montana on the 16th day of March, 1933, and entitled "An Act Requiring Every Person, Firm, Copartnership, Association, Joint Stock Company, Syndicate and Corporation Engaged in or Carrying on the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana to pay License taxes and Providing Penalties," being Chapter 174 of the Laws of Montana of 1933, as amended by an Act approved by the Governor of said state on the 20th day of January, 1934. A copy of said statute and a copy of the amendment are hereto annexed and made a part hereof as Exhibits "A" and "B" respectively.

4. That this suit involves a federal question and presents a substantial controversy arising under the Constitution and the laws of the United States, as will appear from the statements and allegations hereinafter made, and the amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

5. That the State of Montana, under and by virtue of Section 14, of Article XV of the Constitution of said state, [fol. 5] and Sections 6645 and 6646 of the Revised Codes of Montana of 1921, granted to this plaintiff the right to maintain and operate telephone lines and a telephone system in the State of Montana, and for that purpose to set its

poles, piers, abutments, wires, and other fixtures, along, across or under any of the public roads, streets, or highways of the State of Montana, in such manner as not to incommode the public in the use of such roads, streets and highways, and that this plaintiff accepted said grant, and has constructed throughout the State of Montana, a comprehensive telephone system for the purpose of furnishing to the residents and citizens of the State of Montana, and to the people in Montana generally, communication services with other residents and citizens of Montana, and with residents and citizens of other states and foreign countries, and that now, and for many years past, this plaintiff has owned and operated a telephone system extending throughout the State of Montana, the States of Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and part of Texas, and that the telephone system and instruments so owned and operated in Montana are now, and have been during the entire calendar year of 1933, and for many years prior thereto, an integral and organic part of its entire system and plant located throughout said states, and the business and operations carried on in Montana during the year 1933 and at the present time is a part of the general business of operating said systems in said several states and as a whole; that all of said property and all of said telephone instruments, amounting to approximately forty-four thousand, are an integral, organic and necessary part of a vast, comprehensive and extensive telephone system, extending throughout the United States, and to a great many foreign nations, and that each and every telephone instrument in the State of Montana, except 45 which are not effected by said statute, is maintained for the purpose of furnishing to the people in Montana, and to people throughout the United States, and in a great many foreign countries, facilities for immediate telephone communication; that in addition to the telephone service furnished by this plaintiff to the people of Montana, and of other states and countries, [fol. 6] this plaintiff has made, and there is now in force, arrangements with various telegraph companies doing an interstate business, to enable the people of Montana, and of other states and countries, to secure prompt and immediate delivery of telegraph messages by means of the telephone instruments of this plaintiff, and that the telephone instruments of this plaintiff now maintained and operated

by it in the State of Montana, with the exception stated, are being used by the people of the State of Montana for the prompt reception and delivery of such telegraphic messages, in addition to the reception and delivery of telephonic messages; that the same telephone instruments and other equipment owned and operated by this plaintiff at this time, and for many years past, which are used in furnishing local or exchange service between points, all of which are within the State of Montana, are also now used, and have been used during the entire calendar year of 1933, and for many years prior thereto, in furnishing such long distance, interstate and foreign telephone communications, and that in the rendition of said long distance service, each and every telephone instrument, with the exception of the said 45 instruments, and the continued maintenance and operation thereof are necessary and indispensable therefor.

6. That the enforcement of said statute and the collection of said tax would inflict and impose upon said interstate and foreign commerce a burden, in violation of and contrary to the commerce clause of the Constitution of the United States, being Article I, Section 8, Clause 3 of said Constitution.

7. That plaintiff is required, by virtue of the grant of the right to construct, maintain and operate said telephone system, to furnish local or exchange service to the people of Montana, and as it cannot abandon its local business in Montana, while continuing to conduct an interstate and foreign business, the imposition of such tax is a burden upon its interstate and foreign business, in violation of said commerce clause of the Constitution of the United States.

[fol. 7] 8. That said statute is unconstitutional and void in that it imposes a tax upon the right of this plaintiff to maintain said telephone system and conduct a telephone business in the State of Montana, thereby impairing the obligation of the contract of this plaintiff with the State of Montana, resulting from the acceptance of the said grant of the right to construct, maintain and operate said system and conduct said business, in violation of Section 10 of Article I of the Constitution of the United States.

9. That said statute is unconstitutional and void by reason of the exceptions therefrom of telephone instruments

as therein stated, in that this plaintiff is thereby denied the equal protection of the laws, in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and said statute is, for the same reason, in violation of the uniformity requirements of Section 11 of Article XII of the Constitution of Montana.

10. That said statute is unconstitutional and void in that the penalties imposed thereby are so severe and excessive as to deny to this plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

11. That said statute is unconstitutional and void because of the amount of the exaction therein imposed, which is arbitrary, unreasonable and oppressive, and constitutes an unlawful taking of this plaintiff's property, without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and the due process provisions of Article III, Section 27, of the Constitution of the State of Montana, and is a practical confiscation of this plaintiff's property, and interferes with the performance of its obligation to render a public utility service in the State of Montana, and in the other states in which it operates.

12. That said statute is unconstitutional and void, in that it directs the Treasurer of the State of Montana to pay moneys out of the treasury of the State of Montana without specific appropriations having been made therefor by law, as required by Section 10 of Article XII of the Montana Constitution.

[fol. 8] 13. That said statute is unconstitutional and void in that the amount thereby appropriated and to be credited to the emergency relief fund is not specified, as required by said Section 10 of Article XII of the Constitution of Montana.

14. That said statute is unconstitutional and void for the reason also that by authorizing the Governor to determine the amount of said tax to be credited to the emergency relief fund, there is a delegation of legislative power to said Governor, in violation of Section 1 of Article IV of the Constitution of Montana.

15. That said statute is unconstitutional and void for the further reason that the maintenance and operation of said telephone system is not a privilege but is a duty and obligation imposed upon plaintiff by virtue of the said grant and the acceptance thereof, and the imposition of said tax is in violation of the Constitution of Montana and particularly Section 1 of Article XII.

16. That said statute, without the amendment, is unconstitutional and void in that it deprives this plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by reason of the provision that the tax should in no manner affect the rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern.

17. That said statute is unconstitutional and void, in that it is a special law for the assessment or collection of taxes, and violates the provisions of Article V, Section 26, of the Constitution of the State of Montana.

18. That as plaintiff is informed, believes and alleges, the defendants threaten to and will, unless enjoined from so doing by this Honorable Court, commence and prosecute, or cause to be commenced and prosecuted, an action or actions against this plaintiff to recover said tax, and commence or cause to be commenced criminal proceedings to enforce the penalties provided in said Act.

[fol. 9] 19. That this plaintiff has paid all general property taxes imposed by the State of Montana, and the political subdivisions thereof, upon all property of this plaintiff, including said telephone instruments, for the year 1933 and prior years, with the exception of one-half of the property taxes for the year 1933, which will not become delinquent until after the 31st day of May, 1934, and has also paid to the State of Montana all corporation license taxes due and payable under and by virtue of Sections 2296 to 2304 inclusive of the Revised Codes of Montana of 1921, as amended.

20. That more than 35,000 of said telephone instruments are affected by said statute, before the amendment thereof, in that the rates charged therefor are in excess of the rates mentioned in the proviso to Section 1 thereof, and

approximately 33,000 of said telephone instruments are affected by said statute, as amended, in that the rates therefor were and are in excess of the rates mentioned in Section 1 as amended, and more than 10,000 of said telephone instruments affected by said statute, as amended, were actually used for interstate and foreign communications during the year 1933.

21. That this plaintiff has no plain, adequate and complete remedy at law, or any remedy, except by the interposition of this court of equity.

In consideration whereof, and for as much as this plaintiff is without plain, adequate and complete remedy at law, or any remedy, save in this court of equity, plaintiff prays:

First. That the aforesaid statute passed by the Legislature, and approved by the Governor of the State of Montana on the 16th day of March, 1933, a copy of which statute is hereto attached and made a part hereof, and for identification marked Exhibit "A" and the amendment thereto, marked Exhibit "B", and all the taxes and penalties therein prescribed, be declared unconstitutional, void, and unenforceable as to and against this plaintiff; that the defendants herein, and each of them, their agents, servants and employees, and all persons acting under or [fol. 10] through their authority, or by virtue of the authority of their office, be enjoined and restrained in the enforcement and execution of said provisions of said statute, and the collection of, and in the attempt to collect, said taxes and penalties from this plaintiff, levied and imposed upon its property within the State of Montana, and that a hearing and determination shall be had herein by three judges, as provided by Section 380 of the United States Code Annotated (Judicial Code, Section 266, amended), for an interlocutory and permanent injunction, and that meanwhile and until the hearing and determination of the application for an interlocutory injunction, as aforesaid, the defendants, and each of them, their agents, servants, and employees, and all other persons acting under or through their authority, or by virtue of the authority of their office, be restrained by a temporary restraining order, as provided in said Section 380 of the United States Code Annotated, to prevent immediate, great and irreparable injury, loss and damage to the plaintiff, which will result, as afore-

said, and particularly with respect to the aforesaid heavy statutory penalties, before notice can be served, and a hearing had upon the application for an interlocutory injunction.

Second. That this plaintiff be granted such other and further relief, both general and special, as may be just and equitable.

And may it please Your Honor to grant unto the plaintiff a writ of subpœna of the United States of America, issuing out of and under the seal of this Honorable Court, directed to Frank H. Cooney, as Governor of the State of Montana, Raymond T. Nagle, as Attorney General of the State of Montana, and James J. Brett, as Treasurer of the State of Montana, enjoining them, and each of them, on a date certain therein to be named, and under a certain penalty, to be and appear before this Honorable Court, then and [fol. 11] there to answer, but not under oath, all and singular the premises, and to stand to perform or abide by such further direction and decree as shall be made against them in the premises.

Milton Smith, J. R. Turnquist, Gunn, Rasch, Hall & Gunn, Solicitors for Plaintiff. M. S. Gunn, of Counsel.

Duly sworn to by J. N. Whittinghill. Jurat omitted in printing.

[fol. 12] EXHIBIT "A" TO BILL OF COMPLAINT

An Act Requiring Every Person, Firm, Copartnership, Association, Joint Stock Company, Syndicate and Corporation Engaged in or Carrying on the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana to Pay License Taxes and Providing Penalties

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. Every person, firm, copartnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines

and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of January each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business, based upon the number of telephone instruments owned, controlled and operated by it during all or any part of the calendar year, to-wit: On the first twenty (20) telephone instruments or less a license tax of Ten Cents (10¢) per phone; from twenty (20) to seventy-five (75) such instruments a license tax of Twenty Cents (20¢) per phone, and on all above seventy-five (75) a license tax of One Dollar ($1.00) for each such instrument. The license tax so paid shall in no manner affect the rates charged to the patrons and users of such telephone instruments, but shall be borne entirely by the owning and operating concern. Provided, the tax herein provided for shall not be imposed on any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Three Dollars ($3.00) per month for business house or office phone.

Section 2. A telephone instrument is hereby defined to be a transmitter and receiver capable of use in the transmitting and receiving of telephone communications.

Section 3. Any violation of any of the provisions of this Act shall be deemed a misdemeanor and shall be punished by fine of not more than One Thousand Dollars ($1,000) or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

Section 4. All license fees paid to the State Treasurer under the provisions of this Act shall be by him, before the end of each fiscal year, divided by the counties in this state according to the number of telephone instruments in use from time to time in the respective counties of the state and on each such computation and division the State Treasurer shall transmit the share of each county to the County Treasurer thereof, for the use and benefit of the county general fund.

Section 5. This Act shall be in full force and effect from and after its passage and approval.

Approved March 16, 1933.

[fol. 13] EXHIBIT "B" TO BILL OF COMPLAINT

An Act Amending Section 1, and Section 4, of Chapter 174, of the Session Laws of 1933, Requiring Every Person, Firm, Co-partnership, Association, Joint Stock Company, Syndicate and Corporation Engaged In or Carrying On the Business of Constructing, Maintaining and Operating Telephone Lines and Telephone Instruments Within the State of Montana, to Pay License Taxes and Providing Penalties

Be It Enacted by the Legislative Assembly of the State of Montana:

Section 1. That Section 1, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 1. Every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana, whether as owner, lessee, trustee or receiver or in any other capacity, shall pay in to the State Treasurer on or before the first day of March each year a license tax in the amounts following for each telephone instrument used, controlled and operated by it in the conduct of such business:

"A license tax of Two Dollars ($2.00) for each such instrument.

"No bill, statement or account rendered or given any customer by any telephone company shall set out or contain, as a separate item, any amount on account or by reason of the license tax imposed by this Act. Every person, firm, co-partnership, association, joint stock company, syndicate or any corporation affected by the provisions of this Act shall be permitted to claim as exempt from the tax imposed by this Act any telephone instrument where the rate charged the customer therefor does not exceed Two Dollars ($2.00) per month for residence phone, or Four Dollars ($4.00) per month for business house or office phone. Provided further, that the provisions of this Act shall not apply to mutual telephone companies or lines not [fols. 14 & 15] organized or used or operated for private or corporate gain."

Section 2. That Section 4, of Chapter 174, of the Session Laws of 1933, be amended to read as follows:

"Section 4. Five per centum (5%) of the license fees paid to the State Treasurer under this Act are hereby appropriated and shall be set aside by him for the purpose of defraying the cost of administering this Act by the State Board of Equalization, and the remaining ninety-five per centum (95%) thereof shall be by him credited to the Emergency Relief Fund until such time as the Governor may issue a proclamation to the effect that the same is no longer required for such Emergency Relief Fund, and after the issuance of such proclamation said ninety-five per centum (95%) of such license fees shall be by such State Treasurer credited to the General Fund of the State."

Section 3. No tax which has attached, accrued, or become due or payable under the provisions of Chapter 174, Session Laws, 1933, shall be released or waived by the passage or approval of this Act but the same shall be paid as provided in said Chapter before its amendment by this Act.

Section 4. This Act shall be in full force and effect from and after its passage and approval.

Approved Jan. 20, 1934.

[File endorsement omitted.]

[fols. 16 & 17] In United States District Court

[Title omitted]

Amendment to Bill of Complaint—Filed April 24, 1934

Now comes the plaintiff and by permission of court amends its bill of complaint by adding thereto paragraph 13a, reading as follows:

13a. That said statute is in violation of Section 5 of Article X of the Constitution of Montana, and therefore void for the reason that provision is made therein for crediting 95% of said tax to the "Emergency Relief Fund", which fund is for the sustenance of life and relief of dis-

tress among the people of the state, when economic conditions, industrial inactivity, or other cause, over which they have no control, has deprived of support, as provided in Chapter 20 of the Laws of Montana of the Extraordinary Session of 1933, and the furnishing of such relief is a duty and obligation resting upon the counties of the state, and for which the state is without power or authority to impose or collect taxes.

Further amends by substituting for paragraph 21 of said bill of complaint, the following:

21. That this plaintiff has no plain, adequate, or complete remedy at law, or any remedy, except by the payment of said tax under protest and an action to recover, as provided in Section 1 of Chapter 142 of the Laws of Montana of 1925, which remedy is wholly inadequate, for the reason that such statute provides, and as construed by the Supreme Court of the state in the case of Fulton Oil Co. v. Toole County, 86 Mont. 367, no interest shall be recovered on any payment as made.

Hilton Smith, Jr., J. R. Turnquist, Gunn, Rasch, Hall & Gunn, Solicitors for Plaintiff. M. S. Gunn, of Counsel.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT ANSWER—Filed March 19, 1934

Come now the defendants, Frank H. Cooney, as Governor of the State of Montana, Raymond T. Nagle, as Attorney General of the State of Montana, and James J. Brett, as Treasurer of the State of Montana, and for their joint answer to the Bill of Complaint filed herein, admit, deny and allege:

I

Defendants admit the allegations contained in paragraphs numbered 1, 2, 3, 4, 18 and 19 of the Bill of Complaint.

II

Defendants admit the allegations contained in paragraph numbered 5 of the Bill of Complaint as far as the word "Texas" in line 16, page 3 of said Bill, and allege that they and each of them are without knowledge or information whether the telephone system or instruments owned and operated in Montana by the plaintiff are or have been during the year of 1933, an integral and organic [fol. 19] part of the entire system and plant located throughout the states of Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and a part of Texas, and whether the business and operations of said plaintiff carried on in the State of Montana during the year 1933 and at the present time, is a part of the general business of operating said system in said several states as a whole; whether all of the property of the plaintiff and all of its telephone instruments, or any part thereof, in Montana, are an integral, organic and necessary part of a telephone system extending throughout the United States and to a great many foreign states, and whether each and every telephone instrument in the State of Montana, excepting forty-five (45), is maintained for the purpose of furnishing to the people of Montana and to the people throughout the United States and in many foreign countries facilities for immediate telephone communication; whether in addition to the telephone service furnished by this plaintiff to the people of the State of Montana and other states and countries, the plaintiff has made, or whether there is now in force arrangements with various telegraph companies doing an interstate business, to enable the people of Montana and of other states and countries to secure prompt and immediate delivery of telegraph messages by means of the telephone instruments of this plaintiff, or whether the telephone instruments of this plaintiff maintained and operated in the State of Montana, with the said exception, are being used by the people of the State of Montana for the prompt reception and delivery of such telegraph messages in addition to the reception and delivery of telephonic messages; whether the same telephone instruments and other equipment used and operated by this plaintiff at this time or for many years past, used in furnishing local exchange service between points within the State of

Montana, are also now used and have been used during the year 1933 or for many years prior thereto in furnish-
[fol. 20] ing such long distance interstate and foreign telephone communications; and whether in the rendition of said long distance service each and every telephone instrument, with the exception of the said forty-five instruments, is necessary and indispensible therefor in the continued maintenance and operation thereof, all as alleged in said paragraph 5, and therefore deny the same and deny each and every allegation of said paragraph not herein specifically admitted.

III

Defendants deny that the enforcement of the statute and the collection of the tax would inflict or impose any burden or undue burden upon the interstate and foreign commerce of the said plaintiff, and deny that it would be in violation of Article I, Sec. 8, Clause 3 of the Constitution of the United States, or otherwise, or in violation of or contrary to the commerce clause of the said Constitution, and deny each and every allegation of paragraph 6 of the Bill of Complaint.

IV

Defendants admit that the plaintiff is required to furnish local or exchange service to the people of Montana within the territory which it professes to serve, but not otherwise, and deny that plaintiff cannot abandon its local business in Montana while continuing to conduct an interstate and foreign business, and deny that the imposition of the said license tax provided in said statute is a burden upon plaintiff's interstate and foreign business in violation of the commerce clause of the Constitution of the United States, or otherwise; as alleged in paragraph 7 of the Bill of Complaint, and except as herein specifically admitted, deny each and every allegation thereof.

[fol. 21] V

Defendants deny that the said statute imposes a tax upon the right of the plaintiff to maintain a telephone system or to conduct a telephone business in the State of Montana, and deny that the obligation of the contract of this

plaintiff with the State of Montana is thereby or otherwise impaired, and deny that the said statute is for that reason, or any other reason, unconstitutional or void or in violation of Sec. 10 of Article I of the Constitution of the United States, or of any other provision thereof, as alleged in paragraph 8 of the said Bill of Complaint, and deny each and every allegation thereof.

VI

Defendants deny that by reason of the exceptions or exemptions of the telephone instruments as in said statute stated, or otherwise, the plaintiff is denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and deny that said statute for said reason, or otherwise, is in violation of the uniformity requirements of Section 11 of Article XII of the Constitution of Montana, or any other provision thereof, and deny that the said statute is unconstitutional and void for the reasons stated in paragraph 9 of the said Bill of Complaint, or otherwise, and deny each and every allegation thereof.

VII

Defendants deny that the penalties imposed by said statute are severe or excessive, or are so severe or excessive as to deny the plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and deny that the said statute for that reason, or otherwise, is unconstitutional and void, [fol. 22] as alleged in paragraph 10 of the Bill, and deny each and every allegation thereof.

VIII

Defendants deny that the said statute is unconstitutional and void because of the amount of the exaction therein imposed, or otherwise, and deny that said exaction is arbitrary, unreasonable or oppressive, and deny that said exaction constitutes a taking of plaintiff's property without due process of law, or that it is contrary to the Fourteenth Amendment to the Constitution of the United States, or of the due process provisions of Article III, Sec. 27 of the Constitution of the State of Montana, and deny that it is a

confiscation of plaintiff's property or interferes with the performance of plaintiff's obligation to render a public utilities service in the State of Montana, or in the other states in which it operates, as alleged in paragraph 11 of the Bill, and deny each and every allegation thereof.

IX

Defendants deny that said statute directs the treasurer of the State of Montana to pay moneys out of the treasury of the State of Montana without specific appropriations having been made therefor by law, as required by Section 10 of Article XII of the Montana Constitution, or otherwise, and deny that for that reason or any other, the said statute is unconstitutional and void as alleged in paragraph 12, and deny each and every allegation thereof.

X

Defendants deny that the amount appropriated by said statute and to be credited to the Emergency Relief Fund is not specified as required by Section 10 of Article XII of the Constitution of Montana, or otherwise, and deny that said statute is for that or any other reason unconstitu- [fol. 23] tional and void, as alleged in paragraph 13 of said Bill, and deny each and every allegation thereof.

XI

Defendants deny that the Governor is authorized to determine the amount of the tax to be credited to the Emergency Relief Fund, and deny there is a delegation of legislative power to the Governor by said statute, in violation of Sec. 1 of Article IV of the Constitution of Montana, or otherwise, and deny that said statute is for that reason unconstitutional and void, as alleged in paragraph 14 of said Bill, and deny each and every other allegation thereof.

XII

Defendants deny that the maintenance and operation of said telephone system is not a privilege, and deny that the maintenance and operation thereof is a duty and obligation imposed upon plaintiff, except admit that the maintenance and operation thereof is a duty and obligation imposed upon the plaintiff in the territory which it professes

to serve, and deny that the imposition of said tax is in violation of the Constitution of Montana, or of Section 1, Article XII thereof, or that it is unconstitutional and void for the reason alleged in paragraph 15 of the Bill, or otherwise, and deny each and every allegation not herein specifically admitted.

XIII

Defendants deny that the statute without amendment, by reason of the provision thereof that the tax should in no manner affect the rates charged to the patrons and users of such telephone instruments, but that it shall be borne entirely by the owning and operating concern, deprives the plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Con- [fol. 24] stitution of the United States, and deny that said statute is for that reason unconstitutional and void as alleged in paragraph 16 of the Bill, or otherwise, and deny each and every allegation thereof.

XIV

Defendants deny that the statute is a special law for the assessment or collection of taxes, and in violation of the provisions of Article V, Section 26 of the Constitution of the State of Montana, or otherwise, and deny that the statute is for that or any other reason unconstitutional and void, as alleged in paragraph 17, and deny each and every allegation thereof.

XV

Defendants allege that they and each of them have no knowledge or information whether 35,000 of said telephone instruments are affected by the statute before the amendment thereof, or how many of said telephone instruments are affected by said statute, or whether 35,000 of said telephone instruments are affected by the statute as amended, or what number of said telephone instruments are affected by the statute as amended, or whether more than 10,000 of the said telephone instruments, or what number of said telephone instruments affected by the statute as amended, were actually used for interstate and foreign communications during the year 1933, as alleged in paragraph 20 of the Bill, and therefore deny the same, and each and every allegation thereof.

XVI

Defendants deny that the plaintiff is without plain, adequate or complete remedy at law, or without any remedy except by the interposition of this court of equity.

[fols. 25 & 26] XVII

Except as hereinabove specifically admitted, denied or qualified, these answering defendants deny specifically each and every and all other allegations contained in said Bill of Complaint.

Wherefore the defendants pray that the plaintiff take nothing by its suit; that the Bill of Complaint herein be dismissed and that the defendants recover their costs of suit incurred herein.

Raymond T. Nagle, Attorney General for the State of Montana; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fols. 27 & 28] In United States District Court

[Title omitted]

Amendment to Answer—Filed April 24, 1934

Come now the defendants and by permission of court amend their answer to the bill of complaint filed herein by adding thereto paragraph Xa, reading as follows:

Xa

Defendants deny that the furnishing of the funds for the Emergency Relief Fund as provided in Chapter 20, Laws of Montana of the Extraordinary Session of 1933, or by said Chapter 54 thereof, is a duty or obligation resting upon the counties of the State, and deny that the State is without power or authority to impose or collect taxes for said Emergency Relief Fund or for the purpose mentioned in said Chapter 54, and deny that for that reason or for the reasons mentioned in paragraph 13a of the bill of com-

plaint, or at all, the said statute is in violation of Section 5, Article X of the Constitution of Montana and void, and deny each and every allegation thereof.

Raymond T. Nagle, Attorney General; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 29] In United States District Court, District of Montana

No. 1495

The Mountain, etc., Telegraph Co.

vs.

Cooney, as Governor of Montana, et al.

Before Garrecht, Circuit Judge, and Pray and Bourquin, District Judges

Opinion—Filed May 21, 1934

Bourquin, District Judge:

In this suit to enjoin local taxes, the hearing is interlocutory and final.

The statute (33 Mont. Sess., Ch. 174, amended 33 Ex. Sess., Ch. 54) provides that all operating telephone lines and furnishing service in Montana shall pay for each phone used in such business, an occupation license tax for revenue of 20 cents to $2 per year, dependent upon the number of phones and rates charged.

Non-payment or/and shifting the burden to patrons may be heavily penalized. The receipts are to be credited to the state's emergency fund until the governor proclaims no longer so required, and thereafter to the general fund.

Plaintiff is a Colorado corporation owning and operating the only state-wide telephone system in Montana, employing over 34,000 phones subject to the tax, all of which are available for interstate and foreign communication by connection with 30,000,000 phones, and which have been and

are so used in number some 10,000 since the tax was imposed, increasing monthly, and in due time it is reasonably likely, all will be.

The interstate revenues are 4 to 8% of the total revenues by plaintiff received.

It pays the usual property taxes in Montana, and the corporation license or occupation taxes which are a percentage of its intrastate revenues.

In respect to the impost involved, its contention is it is obnoxious to many and doubtless all provisions of the Constitution, federal and state, even remotely applicable. [fol. 30] Briefs filed are anything but that, but we find it unnecessary to note and attempt to distinguish and reconcile the multitude of hair-line cases cited, leaving the task if feasible, to the court of them and to which appeal will be taken.

For it is clear that the suit is indistinguishable in principle from the Adams Express Case, 232 U. S. 14, and the Continental Oil Case, 256 U. S. 642, the rule of which condemns the tax for repugnancy to the Commerce Clause of the federal Constitution.

That is to say, said clause to congress reserves regulation of interstate and foreign commerce, the states have no power therein, a tax like to this at bar upon instrumentalities and not commodities is a burden upon such commerce and in legal effect a regulation of it, in consequence of which it is void.

In Adams Case, the city undertook to exact a license occupation tax for revenue in amount $5 per year upon express wagons. Adams doing interstate and intrastate express business with 341 wagons, brought suit like to this at bar to enjoin collection of the tax as in contravention of the Commerce Clause.

Sustaining the contention, Mr. Justice Hughes observed that though the tax might be construed to apply to intrastate business alone, yet as both varieties of business employed the same wagons and separation was impracticable, to constrain the company to pay the tax and secure a license because of its intrastate business, would be to virtually coerce it to pay a tax and secure a license to do its interstate business, and unconstitutional for reasons aforesaid.

In the Continental Case the state imposed a license occupation tax for revenue in amount $50 per year upon each

gasoline station. The oil company had 37 stations in the state, doing business interstate and intrastate, the former but 5.5% of the total, and brought suit like to this at bar.

Applying the rule of the Adams Case though not citing it, the tax was held void for that even if the state court would construe the tax to apply only to intrastate business, both varieties were necessarily done at any one station, and the tax on the intrastate business as a prerequisite to lawful business, was an impost upon the interstate business as well, illegal, and unenforceable against even the intrastate business.

[fol. 31] Both said cases are cited with approval in Sprout's Case, 277 U. S. 171, in support of Mr. Justice Brandeis' opinion that though a state may impose occupation taxes upon any engaged in both intrastate and interstate business, "in order that the fee or tax shall be valid it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

It may be granted that the tax at bar satisfies the first, second and third of the conditions aforesaid. That is, that the state court would so construe the statute.

See State vs. Tel. Co., 27 Mont. 394.

Nevertheless it fails in respect to the fourth of them.

For in this day and age it is clear separate state-wide systems for intrastate and interstate phones are not feasible, hardly possible, and to deny the proprietor of the latter the right to also operate the former would so heavily handicap and burden him, it would virtually destroy his business, burden and destroy interstate communication or commerce.

Even as in the Adams and Continental Case-, herein separation is impracticable, combination is necessary; and citing those cases to his conditions, by his fourth thereof Mr. Justice Brandeis evidently means that withdrawal to escape the tax must be practicable and combination not necessary, or the tax is invalid.

It is somewhat surprising that in imposing taxes on corporations like plaintiff, legislatures so often transgress the Commerce Clause. For as the Supreme Court has often

observed, be they not taxed sufficiently, there are many ways to impose a valid tax upon their intrastate business without affecting their interstate business. In interstate and intrastate rate regulation is clear analogy.

The principle of said cases is that a burdensome state occupation tax on instrumentalities necessarily used in both interstate and intrastate commerce is a regulation of the former and invalid; and a trial court can do better or worse than to align with it, however the personnel or views of the appellate tribunal may change.

[fols. 32 & 33] Indeed, Montana resorts to one of them in the corporation license or occupation tax which plaintiff pays.

Perhaps as curious a way as any to escape running foul of the Commerce Clause and upheld by the Supreme Court, is that of Edelman's Case, 289 U. S. 249.

In that case, the corporation imported and stored gasoline for its own use intrastate and interstate. The state imposed a license tax of 4 cents per gallon upon the "use" of gasoline within it. And the court held that as the state administered the law as a tax on the "use" of the gasoline in withdrawing it from storage and putting it in the intrastate planes, the tax is valid. Carried to its logical conclusion, interstate commerce can be strategically subjected to any tax.

If the rule be sound, why would not the tax at bar be valid had the statute declared it imposed upon the phones "used" by lifting them from the bracket and before interstate communication commenced, or be valid do the state officers so construe it? But they have not.

It is hardly necessary to repeat the tax is a privilege or occupation tax and not a property tax. If it were the latter, however, it would be invalid for contravention of the state constitution that it shall be levied at a uniform rate upon just valuation.

Decree for plaintiff.

[File endorsement omitted.]

[fols. 34 & 35] In United States District Court

[Title omitted]

Dissenting Opinion—Filed May 21, 1934

Garrecht, Circuit Judge, dissenting:

The license in question is nothing more than a tax. The penalty provided is but a mode of enforcing its payment. There is no restriction upon business in interstate commerce. From the record it appears that the fee or tax is imposed solely on account of the intrastate business. The amount exacted is not increased because of the interstate business done. One engaged exclusively in interstate commerce would not be subject to the imposition. The plaintiff could discontinue the intrastate business without withdrawing also from interstate business. It is assumed in the opinion that to require the plaintiff, in order to save the tax, to discontinue its intrastate business would impose too great a burden upon it. If business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power. Resultant hardship is not within their province to redress. Postal Telegraph-Cable Co. vs. Charleston City Counsil, 153 U. S. 692; Postal Telegraph-Cable Co. vs. Richmond, 249 U. S. 252, 257.

[File endorsement omitted.]

[fol. 36] In United States District Court, District of Montana

In Equity

No. 1495

The Mountain States Telephone and Telegraph Company, a Corporation, Plaintiff,

vs.

Frank H. Cooney, as Governor of the State of Montana; Raymond T. Nagle, as Attorney General of the State of Montana; and James J. Brett, as Treasurer of the State of Montana, Defendants

Findings of Fact, Conclusions of Law, and Decree—Filed May 31, 1934

This cause having come on regularly for hearing on April 24, 1934, before Garrecht, Circuit Judge, and Bour-

quin and Pray, District Judges, constituting a three-judge court, convened pursuant to the provisions of Section 380 of the U. S. Codes Annotated, at Helena, Montana, upon the application of the plaintiff for an interlocutory injunction enjoining the defendants from enforcing or attempting to enforce against the plaintiff the provisions of Chapter 174 of the Montana Session Laws of 1933, and as amended by Chapter 54 of the Special Session of 1933, and at the conclusion of the hearing said cause having been submitted for final decision and decree, and the Court having considered the pleadings and evidence, makes findings of fact, conclusions of law, and renders its decree, as follows:

[fol. 37] FINDINGS OF FACT

1. That the plaintiff is a Colorado corporation, duly authorized and qualified under the laws of the State of Montana to do, and is now doing, and at all times mentioned in the complaint was doing, a general telephone business, and owns and operates a telephone system in Montana, furnishing thereby telephone service of an interstate and intrastate character to the general public in Montana.

2. That the defendant Frank H. Cooney is the Governor of the State of Montana; that the defendant Raymond T. Nagle is the Attorney General of the State of Montana; that the defendant James J. Brett is the Treasurer of the State of Montana; all citizens of the State of Montana.

3. That this suit was brought to enjoin defendants from enforcing the statute enacted by the Legislature of the State of Montana, and approved by the Governor on March 16, 1933, entitled:

"An Act requiring every person, firm, co-partnership, association, joint stock company, syndicate and corporation engaged in or carrying on the business of constructing, maintaining and operating telephone lines and telephone instruments within the State of Montana to pay license taxes and providing penalties,"

being Chapter 174 of the laws of Montana, 1933, which was subsequently amended by an act approved by the Governor on January 20, 1934, being Chapter 54 of the Session Laws of the Extra Session of 1933.

4. That the State of Montana, under and by virtue of Section 14, Article XV, of the Constitution of the state, and Sections 6645 and 6646 of the Revised Codes of 1921, granted to the plaintiff the right to maintain and operate telephone lines and a telephone system in the State of Montana, and the plaintiff has accepted that grant, and has constructed throughout Montana a comprehensive telephone system, and now owns and operates a state-wide telephone system in Montana.

[fol. 38] 5. That the telephone system owned and operated by the plaintiff extends throughout Montana, Idaho, Utah, Wyoming, Colorado, Arizona, New Mexico, and a part of Texas, and the telephone instruments in Montana are an integral part of this system, and are a part of a great system extending throughout the United States, and to a great many foreign countries, and each of these telephones (except 45 not affected by said statute) is available for interstate and foreign communication by connection with some 30,000,000 telephones throughout the entire system; that of these telephones in Montana, over 34,000 are affected by this statute, and of these 34,000, more than 10,000 have actually been used in interstate and foreign commerce since the statute in question was enacted, and in due time it is reasonably likely that all telephone instruments maintained and operated by the plaintiff in the state, as a part of this system, will be so used in interstate and foreign commerce.

6. That the plaintiff pays the usual property taxes in Montana, and also pays the corporation license, or occupation taxes, which are a percentage of its intrastate revenues.

7. That defendants, unless enjoined, will commence and prosecute, or cause to be commenced and prosecuted, actions against the plaintiff to recover said tax, and/or to enforce the penalties provided in said act.

8. That of the telephones which the plaintiff maintains in Montana, affected by this statute, any and all may be used in interstate and foreign commerce by the subscriber or user or by any individual using any of the 30,000,000 telephones so connected as aforesaid.

9. That all of said telephones constituting a part of said system in Montana are instrumentalities of interstate and

[fol. 39 & 40] foreign commerce, and plaintiff could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business.

CONCLUSIONS OF LAW

1. That the court has jurisdiction of the subject-matter of this suit, and the parties herein.

2. That Chapter 174 of the Session Laws of Montana, 1933, as originally enacted, and as amended by Chapter 54 of the Session Laws of the Extra Session, 1933, is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, in that it imposes a burden upon, and constitutes a regulation of, interstate and foreign commerce.

DECREE

It is therefore ordered, adjudged and decreed that the defendants and each of them, and any and all persons acting in aid or assistance of them, or either of them, be and they and each of them are hereby permanently enjoined from taking any action against the plaintiff to enforce against the plaintiff the provisions of Chapter 174 of the Session Laws of Montana of 1933, or said Act as amended by Chapter 54 of the Session Laws of the Extra Session of 1933, and from collecting or attempting to collect any tax or enforce, or attempting to enforce any penalty provided for therein.

Dated this 29 day of May, 1934.

Bourquin, for the Court.

[File endorsement omitted.]

[fols. 41 & 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 10, 1934

To the Honorable District Court of the United States, District of Montana, and to the Honorable Judges Thereof:

The above named defendants, and each and all of them, feeling aggrieved by the permanent injunction decree and

order made and entered in this cause on the 29th day of May, 1934, do hereby appeal from said injunction decree and order, to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors, which is filed herewith, and they, and each of them, pray that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree and order was based, duly authenticated, may be sent to the Supreme Court of the United States, Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of them to perfect their appeal, be made.

Raymond T. Nagle, Attorney General; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants and Appellants.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 10, 1934

Come now the above named defendants, Frank H. Cooney, as Governor of the State of Montana; Raymond T. Nagle, as Attorney General of the State of Montana; and James J. Brett, as Treasurer of the State of Montana, jointly and severally by and through their counsel and solicitors, Raymond T. Nagle and Enor K. Matson, and respectfully submit the following Assignment of Errors upon which they rely in support of their appeal from the permanent injunction order and decree made and entered on the 29th day of May, 1934, in said cause in the United States District Court for the District of Montana, and under which Assignment of Errors said appellants seek reversal of the decree and order of said Court:

I

The Court erred in finding that any and all of the telephones which the plaintiff maintains in the State of Montana may be used in interstate or foreign commerce for the

reason that the evidence presented is insufficient to support such finding.

II

The Court erred in finding that all of the telephones con- [fol. 44] stituting a part of the plaintiff's telephone system in Montana, are instrumentalities of interstate and foreign commerce for the reason that the evidence presented is insufficient to support such finding.

III

The Court erred in holding and finding that plaintiff could not discontinue its intrastate business and operations in Montana without virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business for the reason that the evidence presented is insufficient to support such holding and finding.

IV

The Court erred in holding that Chapter 174 of the Session Laws of Montana 1933, as originally enacted, and as amended by Chapter 54 of the Session Laws of the Extraordinary Session 1933-4, is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, in that it imposes a burden upon and constitutes a regulation of interstate and foreign commerce, the evidence being insufficient to support such holding or finding and it appearing that said act, and as amended, levies a tax solely upon or on account of the intrastate business of the plaintiff, and it imposes no tax restriction or burden upon or on account of the interstate or foreign business of the plaintiff.

V

The Court erred in rendering a decree for the plaintiff herein permanently enjoining and restraining the defendants, and each of them, and any and all persos acting in aid or assistance of them, or either of them, from taking any action against the plaintiff to enforce against the plaintiff the provisions of Chapter 174 of the Session Laws of Montana of 1933, and as amended by Chapter 54 of the Session Laws of the Extraordinary Session of 1933-4, and [fols. 45-50] from collecting or attempting to collect any

tax, or enforcing or attempting to enforce any penalty provided for therein, on the ground that said act, and as amended, is in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States, in that it imposes a burden upon, and constitutes a regulation of interstate and foreign commerce as said act, and as amended, levies a tax solely upon the intrastate business of the said plaintiff, and it imposes no tax restriction or burden upon or on account of the interstate or foreign business or commerce of the plaintiff.

VI

The Court erred in failing to dismiss the bill of complaint inasmuch as said act, and as amended, is valid as it merely levies or attempts to levy a tax solely upon, or on account of the intrastate business of the plaintiff and it imposes no tax restriction or burden upon the interstate or foreign business or commerce of the plaintiff.

Wherefore, defendants pray that the said permanent injunction decree and order be reversed and set aside, that said injunction be dissolved and for such other and further relief as to the court may seem just and proper.

Dated at Helena, Montana, this 10th day of July, 1934.

Raymond T. Nagle, Attorney General; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants and Appellants.

[File endorsement omitted.]

[fol. 51] In United States District Court

Order Allowing Appeal—Filed July 10, 1934

The petition of the defendants and appellants above named, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States, for the District of Montana, having been filed herein, accompanied by an Assignment of Errors and statement as to jurisdiction,

all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers having been presented to this court and the record in this cause having been considered;

It is hereby ordered that an appeal be, and it is hereby allowed to the Supreme Court of the United States from the permanent injunction decree and order of the District Court of the United States, for the District of Montana, entered in this cause on the 29th day of May, 1934, and that the Clerk of the said District Court of the United States, for the District of Montana, shall, within sixty days from this date, make and transmit to the Supreme Court of the [fols. 52 & 53] United States, under his hand and the seal of the Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or a stipulation of the parties, or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellants shall give a good and sufficient cost bond in the sum of One Thousand Dollars ($1,000), conditioned as required by law.

Done by this Court this 10th day of July, 1934.

Charles N. Pray, District Judge.

[File endorsement omitted.]

[fols. 54-59] Citation in usual form showing service on Gunn, Rasch, Hall & Gunn, filed July 11, 1934, omitted in printing.

[fols. 60-62] Bond on Appeal for $1,000.00, approved and filed July 12, 1934, omitted in printing.

[fols. 63 & 64] In United States District Court

[Title omitted]

Stipulation re Approval of Statement of Evidence—Filed July 25, 1934

It is hereby stipulated and agreed by and between Milton Smith, Jr., J. R. Turnquist, Denver, Colorado, and Gunn,

Rasch, Hall and Gunn, Helena, Montana, Solicitors for Plaintiff, and Raymond T. Nagle, Attorney General, and Enor K. Matson, Assistant Attorney General, Solicitors for Defendants, that the proposed statement of evidence lodged with the Clerk of the above entitled Court on July 25, 1934, by the defendants above named, is agreed to as a correct statement under paragraph B of Equity Rule 75, and may be approved by the above entitled Court, or Judge thereof, without further notice.

Dated at Helena, Montana, this 25 day of July, 1934.

Milton Smith, Jr., J. R. Turnquist, Gunn, Rasch, Hall & Gunn, Solicitors for Plaintiff. Raymond T. Nagle, Attorney General; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fols. 65 & 66] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING STATEMENT OF EVIDENCE—Filed Aug. 2, 1934

On this 2nd day of August, 1934, came on for consideration the matter of approval of the Statement of Evidence lodged herein by defendants and appellants above named, and it appearing to the Court that the ten days' notice of this hearing has been given to the plaintiff as required by Equity Rule 75, and it further appearing that the parties hereto have filed their written stipulation herein, agreeing that said Statement of Evidence is a correct statement under paragraph B of Equity Rule 75, and it further appearing that such statement is true, complete and properly prepared;

It is ordered by the Court that the same be, and is hereby approved as part of the record herein for the purpose of the defendants' appeal to the Supreme Court of the United States.

Charles N. Pray, District Judge.

[File endorsement omitted.]

[fol. 67] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

In Equity

No. 1495

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

FRANK H. COONEY, as Governor of the State of Montana; Raymond T. Nagle, as Attorney General of the State of Montana; and James J. Brett, as Treasurer of the State of Montana, Defendants

Statement of Evidence—Filed Aug. 2, 1934

Be it remembered that the above entitled cause came on regularly for hearing upon the merits before the above entitled Court sitting in equity, Honorable Francis A. Garrecht, Circuit Judge, Honorable George M. Bourquin and Honorable Charles N. Pray, District Judges, presiding, on the 24th day of April, 1934, upon the issues formed by the plaintiff's complaint and the answer thereto, Gunn, Rasch, Hall & Gunn and J. R. Turnquist appearing as counsel for plaintiff, and Raymond T. Nagle, Attorney General of the State of Montana, and Enor K. Matson, Assistant Attorney General of the State of Montana, appearing as counsel for defendants.

That the following is a true and complete transcript of all the evidence or the substance of all the evidence introduced on the trial of said cause, and all of the rulings of [fol. 68] said Court made and entered therein during the trial of said cause.

PLAINTIFF'S CASE

Testimony of R. M. Morris

R. M. MORRIS was duly sworn and testified on behalf of the plaintiff as follows:

Direct examination:

My name is R. M. Morris; age 47; residence, Denver, Colorado; employed by the Mountain States Telephone and

Telegraph Company as assistant vice-president. My duties as such officer are: I have charge of all the commercial activities of the company, which operates in all or part of eight states. Briefly, that involves all the business relations with customers; the maintenance of business offices; the sale of service; the matter of collections, routines, and records that go with the performance of those operations; the development and publishing of all tariffs, rates, rules and regulations, and practices controlling commercial operations; and the negotiating with other telephone companies, associated companies, and telegraph companies, the interchange of traffic agreements, publish directories and matters of that kind.

I was made assistant vice-president in 1929. I have had, however, practically the same capacity since 1923, though under a different title—general commercial manager. As for my connection with the part of that system located in Montana, I was located in Montana with headquarters in Helena. I lived in Helena two and one-half years—from about the middle of 1917 to January, 1920. I was then division commercial superintendent. The division at that time [fol. 69] included all the State of Montana and the northern half of Wyoming.

There are over 34,000 telephone instruments for which a rate was charged a customer of more than $2 per month for residence and more than $3 per month for business or office telephone, which were used, controlled, and operated by the company in Montana from March 16, 1933, to January 1, 1934. There were approximately 29,000 telephone instruments for which a rate was charged a customer of more than $2 per month for residence telephone and more than $4 per month for business or office telephone, which were used, controlled, and operated by the company in Montana from January 1, 1934, to March 1, 1934.

The 34,000 and the 29,000 are the same telephones. I make the separation because there are two Acts. An Act was passed by the assembly in 1933 imposing a tax of $1 a telephone upon all telephones where the charge was in excess of $2 for residence telephones and in excess of $3 for business telephones. That was up to January 1, 1934. Then the Act was amended at the Extraordinary Session by an Act going into effect, I think, January 19th, increasing that tax on business telephones to $2 a telephone, and

providing that the old Act should control as to the license prior to January 1, 1934. For that reason we deemed it important to make the segregation and show the number of telephones used up to January 1, 1934, and the number between January 1, 1934, and March 1st, the date the license Act becomes due under the new Act.

By Mr. Gunn:

These are the same telephones. The amount, however, was reduced by reason of the increase from $3 to $4.

Over 10,000 of these instruments that I have testified were being used by the company between March 16, 1933, [fol. 70] and January 1, 1934, were actually used during that period for interstate communication. There were 2,108 of these telephones used in interstate commerce from January 1, 1934, to March 20, 1934.

"Judge Bourquin: I thought you said there were over ten thousand.

"The Witness: There are two periods again, Your Honor. From March 16th to January 1, 1934, there were over 10,000. From that date to March 20, 1934, there were 2,108 additional telephones, not theretofore used in interstate commerce, which were used during that period."

This does not include all the telephones actually used in interstate commerce, only those affected by the Act. It does not include all that terminated in Montana. Prior to December we did not tabulate the telephone calls which originated in states outside of Montana and terminated in telephones in the State of Montana. This was not done for the reason that our regular system of accounting prescribed by the Interstate Commerce Commission does not require that we set up in current operation that information, and in the normal conduct of our business we have no use for it. So we had to secure this by special study. The routine for obtaining this data required that we organize a special force to secure special tallies of all of that inpaid business. We have, of course, no regular record of it. By inpaid business I mean business originating out of Montana and terminating in Montana and paid for at the originating point.

We have, of course, the original toll tickets, which are the slips of paper on which the toll operators designate the

data from which we bill our toll charges. To obtain the [fol. 71] data we had all those tickets analyzed and tabulated. We showed those that indicated that the call originated in Montana and terminated outside Montana on a paid basis, or originated in Montana on a collect basis and terminated outside of Montana. We showed also those that originated outside of Montana and terminated in Montana or paid—or "in collect" as we call it—in Montana. They bear the dates, the originating point, the number, the time of day, and other information of that sort.

The telephone instruments constituting a part of the system in Montana are used in interstate and international telegraphic communication in the following manner: We have an arrangement with the Western Union and the Postal whereby, with any exchange in any city or town in which we operate a telephone exchange and in which they operate a telegraph business, any person can originate at any telephone in the State of Montana through those exchanges a telegram, cablegram or radiogram to any point in which they operate in Montana, or outside of Montana, or anywhere in the world. Calls originating on their system—telegrams originating on their system—may, on that agreement, be delivered to any telephone in any of these exchanges in Montana, whether the telegram originates in Montana or elsewhere throughout their system.

There are over thirty-two million telephones in the world. There are approximately sixteen million six hundred thousand telephones in the United States.

The plaintiff, the Mountain States Telephone and Telegraph Company, is a subsidiary of the American Telephone and Telegraph Company—the Bell System. There are [fol. 72] twenty-four other companies in the Bell System. We have a contract through the American company that provides for the complete interchange of traffic to or from all telephones in the Bell System.

I gave the number of telephones in the United States. Over thirteen million one hundred thousand of those telephones belong to the Bell System. There are over thirty-two million telephones in the world. Through our system in Montana we have direct connection with approximately thirty million—over 92 per cent—of those telephones. We have traffic arrangements by which we can serve that many telephones anywhere, at rates prescribed covering such

service. We have traffic arrangements, as I have mentioned, through the Bell System. As far as transoceanic and international service is concerned, this— Well, as far as associated companies are concerned, we publish the tariff, of course, from the Denver office.

We also have an arrangement with companies in the United States not a part of the Bell System, by which we have an exchange of traffic. There are approximately 6,700 other connecting companies, operating approximately three and a half million telephones, with which we have traffic arrangements for the interchange of traffic. Some directly; that is, those located in the State of Montana, we have direct agreements with. There are 64 of those. Elsewhere throughout the United States we secure our contract right through the agreement of the American company, which provides that we can interchange traffic over the entire system, including these three and a half million telephones of connecting companies.

Fifty of these sixty-four companies in Montana charge rates not to exceed $2 for house telephones and $4 for busi- [fol. 73] ness house or office telephones. Fourteen are affected by the statute as to such rates as go over those minimums.

The plat or map, marked for identification, "Plaintiff's Exhibit No. 1," is built up, briefly, to show the physical characteristics of the system in the State of Montana. Some of these parallelograms, the solid ones, have names on them indicating points at which the Mountain States owns and operates telephone exchanges. From these points are the radiating subscribers' lines. There are forty-four of those that are not indicated on the map. The parallelograms with broken lines represent some of the connecting companies which I mentioned, existing in Montana. The lines connecting the exchanges, or the parallelograms, indicate the number of telephone channels over which you can talk in, out, or through the State of Montana, starting from any particular telephone.

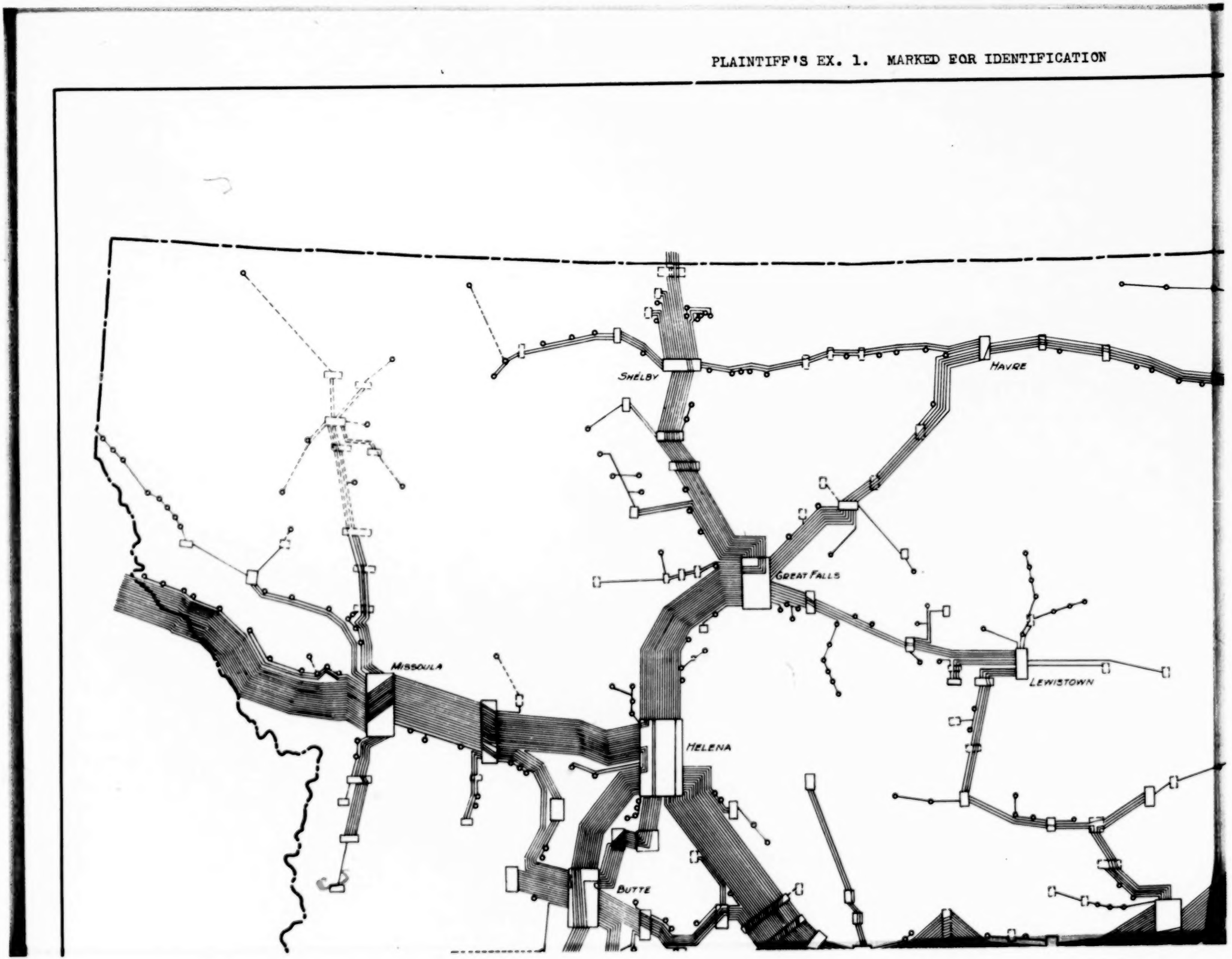
It is evident, therefore, that there is a continuous physical structure to any other telephone within the State with which you may desire communication, and that the same kind of structures exist in other States throughout the United States, so that it is possible from any one telephone to have a continuous channel for communication to any

other telephone located throughout the world. The lines indicate the more or less inseparability of the exchange and toll plant. It is necessary, of course, by the nature of the business, that we establish connections between customers. We do not deliver packages or anything that you can move about. So the structure must be continuous and inseparable.

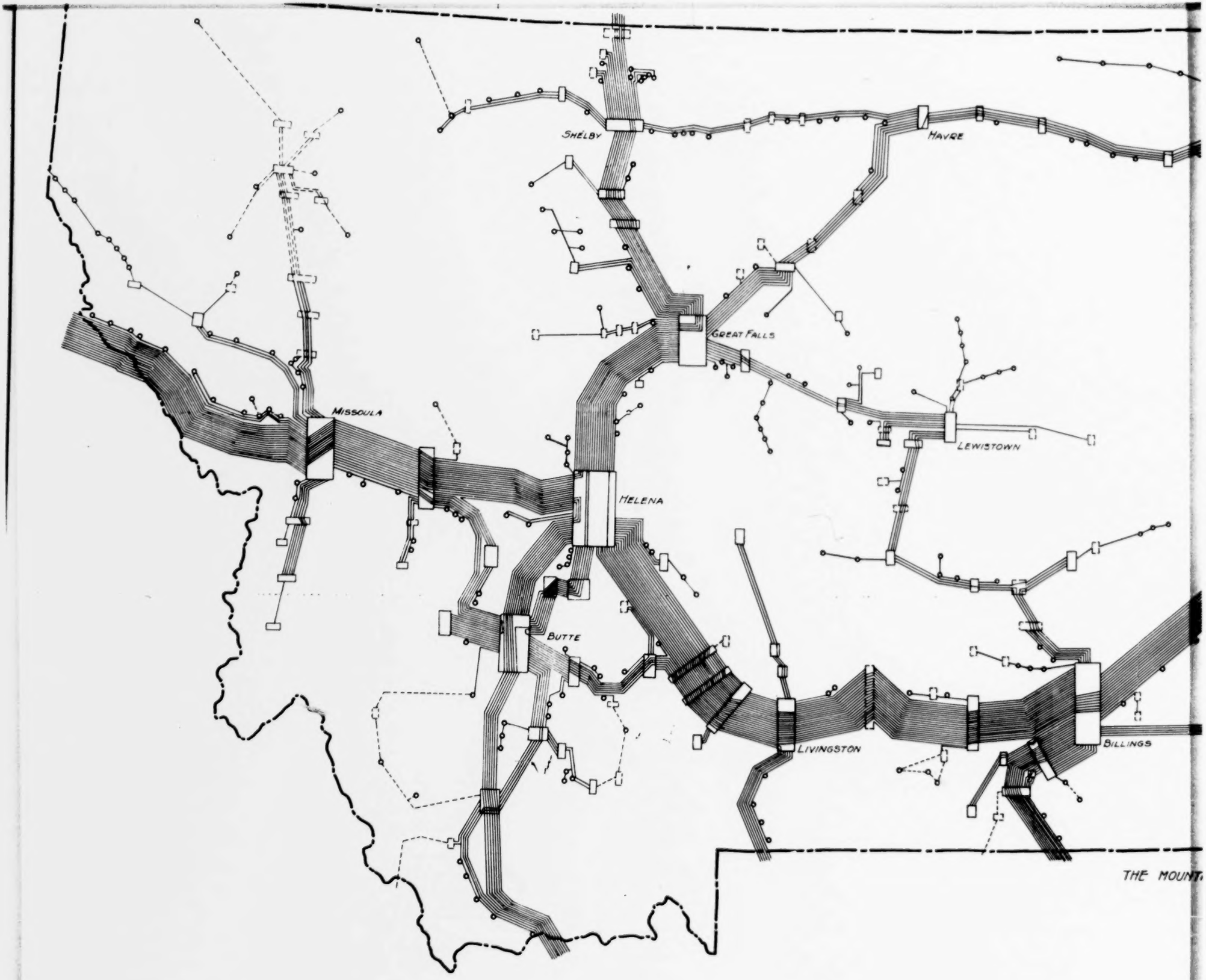
The first interstate line in Montana was opened for public use September 3, 1899. Our company has eighty-[fol. 74] four interstate lines at this time.

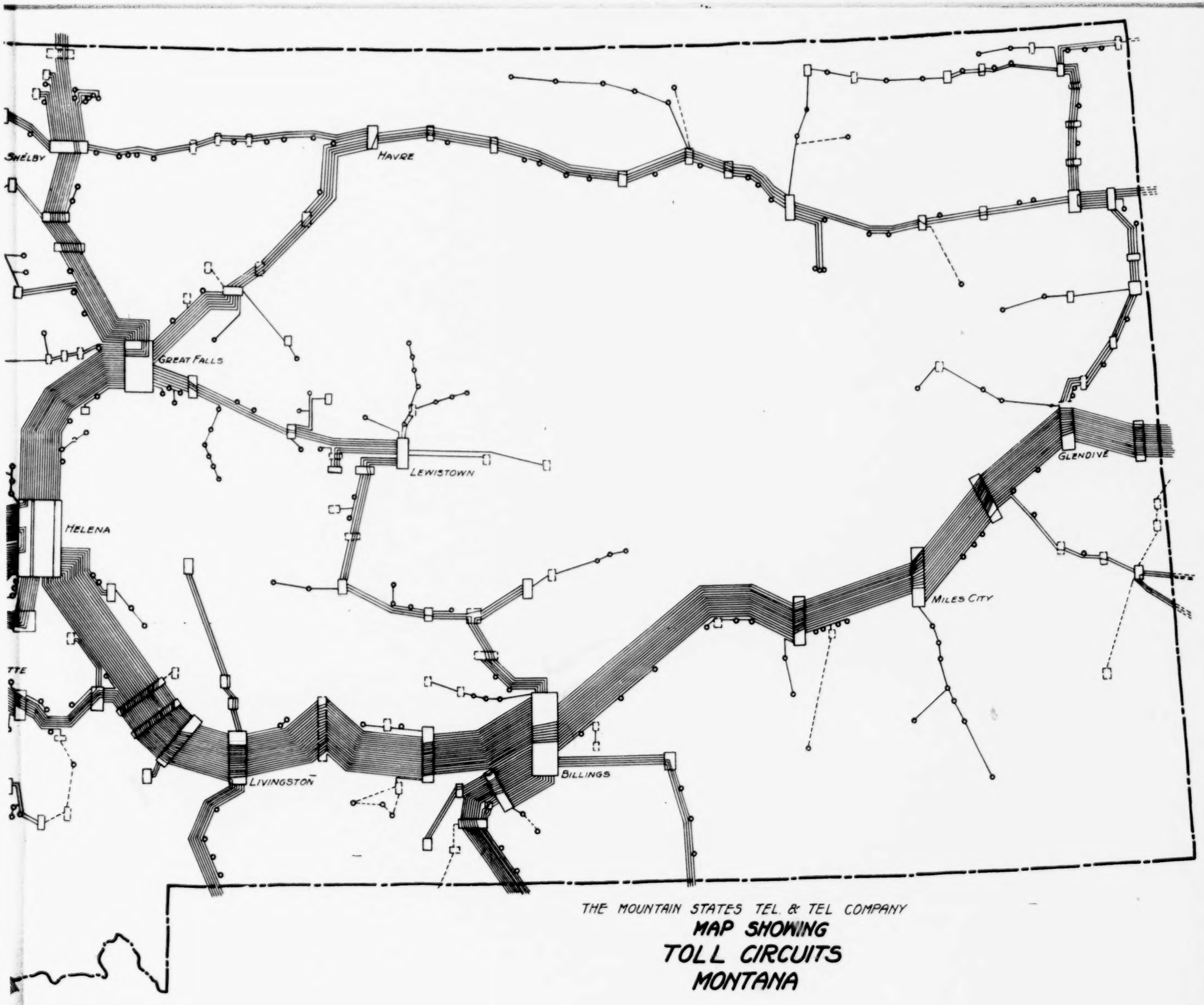
The map was here offered in evidence.

PLAINTIFF'S EX. 1. MARKED FOR IDENTIFICATION



PLAINTIFF'S EX. 1. MARKED FOR IDENTIFICATION


SHELBY
HAVRE
GREAT FALLS
MISSOULA
LEWISTOWN
HELENA
BUTTE
LIVINGSTON
BILLINGS
THE MOUNT.



THE MOUNTAIN STATES TEL. & TEL COMPANY

MAP SHOWING TOLL CIRCUITS MONTANA

"Q. State whether it would not be possible or practicable to separate your Montana business from your interstate business, or your international business.

"Mr. Matson: We object to that as calling for the conclusion of the witness. That is for the Court to determine.

"Judge Garrecht: The objection is overruled.

"Mr. Matson: Note an exception, please."

It would not be possible to operate separately these two classes of service, because, as I indicated there on the map, the same telephone, the same signaling apparatus, the wires in the building, the drop wires to the cables, and the cables, poles, wires, and underground wires we have in the streets and alleys between our customers and telephone and central-office equipment, are used for all classes of service. It is common usage. Largely, your land, buildings, central-office equipment and operating organization is used in common for all services. We think it is obvious to any one with experience that to separate those classes of service would require a hundred per cent duplication of outside distribution plant and telephones, and a large part of duplication of the central-office equipment. The attendant expense of such a disconnected operation would substantially destroy telephone service as it is known today. Your prices would become prohibitive. There are about forty-five private lines or telephones in Montana that are not connected [fol. 75] with the interstate system or cannot be used for interstate communication. They are not even connected with the system.

There is only one instrument and that has to be used for everything. That includes the delivery of telegrams as well.

Eight hundred ninety-seven telephones were used in interstate communication in the month of February of this year which have not been used in interstate communication during the prior period from March 16, 1933. The increase of additional telephones for the month of March was eight hundred twenty-seven. I should like to state there, to get it technically correct, that that is the toll-billing period, ending on the 20th of each month. The question was the calendar month. It is from the 21st of one month to the 20th of the other month. Approximately eight hundred is very close to the average number of additional telephones

used in interstate communication each month in our system. I might explain, if I may, that we have no current record. Therefore we had to start in, following the establishment of this Act, to get evidence so that we would know as a fact how these instruments appeared in interstate commerce usage. We started from nothing, and it has gradually built up, eight or nine hundred a month, until over this period we come to this last date. We come, as a matter of fact, to over 12,000 in toto. Each month adds to that at the rate of about eight hundred. So it is evident to me, from this and my contact with previous studies I have made, that it is only a question of time until practically every instrument in the State of Montana will have been used in interstate commerce. As you approach 100 per cent, of course, the curve will flatten out. It will naturally [fol. 76] become less, because there will be some instrument that persists in no interstate usage. Of course, eventually, practically every one will be used.

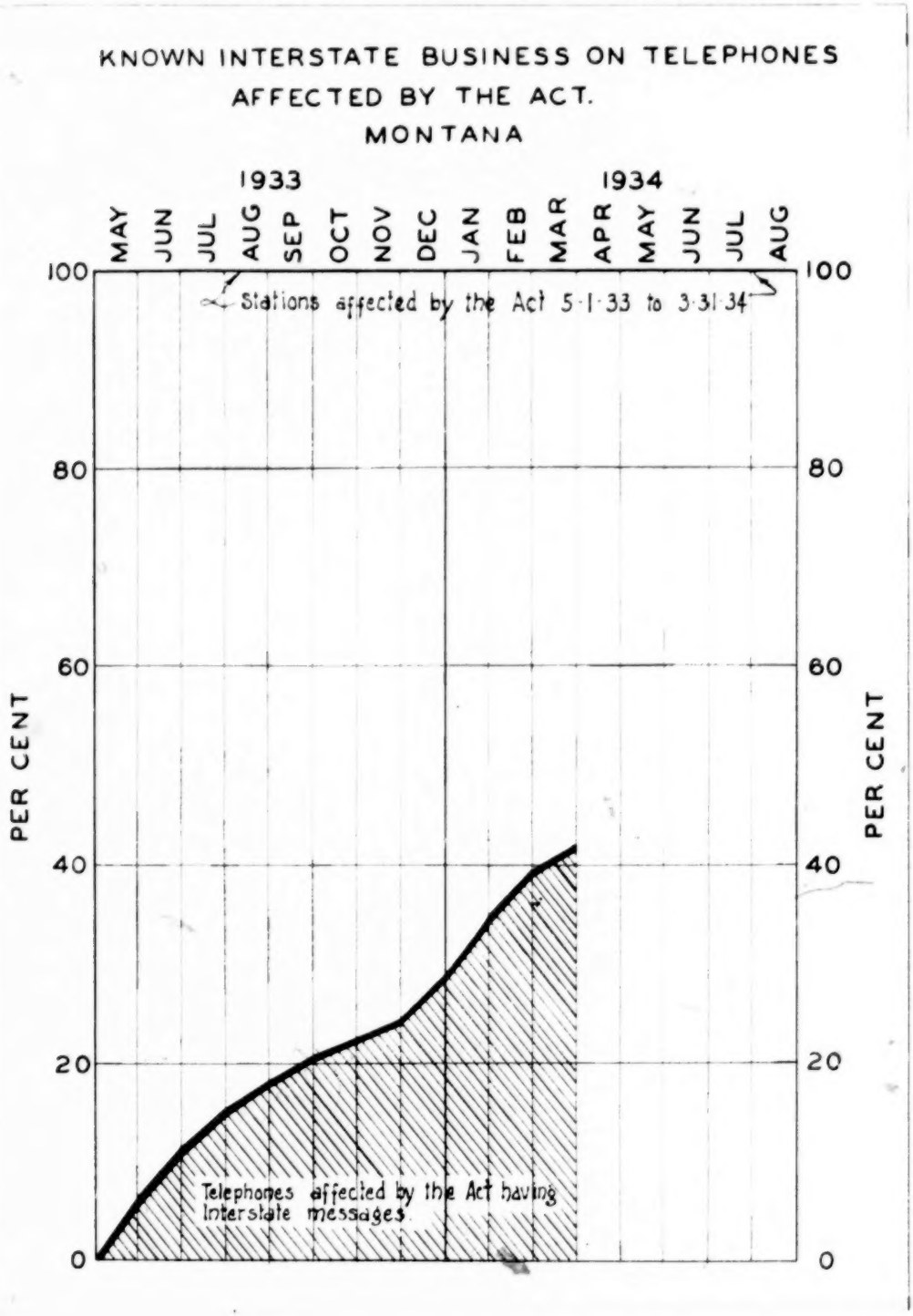
The plat, which has been marked for identification "Plaintiff's Exhibit No. 2," illustrates graphically the changes that I have stated would be involved. We started from the date which is designated there as May. It started, however, April 21st. We could not start right on the day of the Act. We could not get organized to pick up the data. This shows the month to month increase, on a percentage basis, of the number of telephone instruments in the State of Montana that are used for interstate commerce. That includes both telephone and telegraph. It shows that over 40 per cent have been used since the date of this study. The incline of the curve is substantially increased, as I have said. It is just a question of continuing the study every day until practically all telephones will have been used in interstate business. It has been growing quite rapidly. Communication could be made through our system here in Montana to over 92 per cent of the telephones in the world. There are over 32 million telephones in the world. We connect with 30 million.

"Mr. Gunn: We offer this map, and this chart in evidence, if Your Honor please.

"Judge Bourquin: Very well."

(Here follows chart, side folio 75a)

PLAINTIFF'S EX. 2. MARKED FOR IDENTIFICATION



Cross-examination:

I have not, nor has the company, kept any records of the number of times these telephones have been used in foreign business, compared to the— In this study we [fol. 77] took the initial usage and ignored any subsequent usage. Of course, I can give you some idea from other records. Say on a revenue basis from 25 to 30 per cent of the revenue each month will show up as interstate. Taking Lewis & Clark County, and the City of Helena, as an example, there are no records by a count of the number of times that telephones have been used in interstate or foreign or domestic calls. The revenue business, as I stated, could indicate somewhat. In the ordinary conduct of our office we make no distinction in billing a customer. We do not separate the originating revenue; we simply bill it. For the State, as I stated, interstate varies by months between 25 and 30 per cent of the originating toll revenue, excluding local telephone revenue. Those calls will run somewhat less.

I did not bring a copy of our tariff or schedule of rates for toll charges, which have been filed with the State of Montana. Our toll rates are built up on the block rate system. It is so all over the United States. Then we have filed in the local exchange for operator's use, specific rates between the most commonly used points. I did not bring any tariff. It can, of course, be easily obtained.

You could not say that it would not be a possibility that any particular telephone, say your telephone here in the City of Helena, may never be used for interstate commerce. As indicated here, over a period of time, for one reason or another, you get interstate usage. For example, the customer himself in Helena does not control the interstate usage, because his friend or relative, some one outside the State, may call him up tomorrow. Some one might call you when you go home tonight. Some one might call you [fol. 78] up from Salt Lake. You have the customer's will as to usage, and then the demand from the outside. I did not testify that ultimately all the telephones would be used for interstate or foreign business. I said practically all. And I said that as you approach 100 per cent there will be certain stations that will persist for a long time. As you say, it is not impossible. You might have one or two maybe

that are never used. If they stay there in service, you may have, although I do not know.

I would say from this study, which does not run quite a year, under the new Act, which will show a higher percentage, that over 50 per cent of the telephones will be used in a year in interstate telephone or telegraph service. This estimate is based on this study, which we put in evidence, where we counted the initial use of an instrument in interstate business during that period, and made no subsequent counts of interstate use on that telephone. It is an actual accrual of only the instruments that have been used in that period for interstate commerce.

Interrogation by Judge Bourquin:

"Q. Now you say, this time, 12,000 telephones."

"A. Under both acts, your Honor. Over 10,000 in one, and 2,108 in the other period. That makes over 12,000."

Those are separate telephones. There is no duplication of calls. There were that many telephones regardless of how many calls there were over them. Those are telephones which at one time at least were used in interstate commerce. No telephone in that number is counted twice.

Of the originating toll business, 25% used in Montana were in interstate calls. That does not include our city [fol. 79] business. Of the originating toll business, between from 25 to 30 per cent, on a revenue business, will be interstate. These tabulations are on a call basis regardless of the money.

The total receipts interstate and intrastate? That would be about— Just a minute. I can get that a little better than by guessing at it. (Obtaining papers from a brief case.) That would range from 4 to 8 per cent of our total, in the State of Montana. That includes all charges we make, and all assignable revenue to Montana. It would be about— It would range from 4 per cent up around 8.

Our system in the city itself, of course, is a combined unit. Now, a call comes in from one subscriber of the city to another subscriber. A call comes in, as a rule, to central from the originator of the call. That subscriber's line, through switching devices, is connected to the called subscriber's line, and she rings his bell. That act is entirely independent of any interstate, except as to facilities. If

the subscriber then calls some one in Idaho it comes in over the instrument line in the same way as the previous call did. Then, at the point at which the operator would have connected to a regular called subscriber, she connects instead to a toll trunk. In other words, she attaches his line to the toll line going to Idaho, and eventually we get the party.

The fact is that our instrument will be used by the telephone company for telegrams. We have arrangements for that. I consider that the telephone is being used for interstate business in that use, in this way: There are a number of places in Montana where there is no local office of either [fol. 80] the Western Union or the Postal. The messages are given to us, and we send them to the central office, or to the receiving office of the Western Union, and thy are then sent out. I think there is a clear distinction, one from the other as far as interstate commerce is concerned. The communication is delivered at the office with a view of having it sent— Yes, I know that is the same as delivering a message to the telegraph office or to the depot. But it is different with the depot. That receives the goods and sends them on. That is interstate commerce. So in the telephone office. We take the message and— I think there is a difference.

Redirect examination:

The interstate rate takes into consideration an ' contemplates the use of these local telephones in making a toll call. The toll charge is built up from point to point, or what we call from board to board, and it is not including anything for the exchange facility.

By the Court, Judge Bourquin:

"Q. If you did not use the telephone for an interstate call, yet you would pay as much for the local use?"

"A. Yes. We make no distinction in how much he uses local or how much he uses toll in the flat charge."

In that period, in the first period, there were over 10,000 telephones included in our interstate communications, of which over 2,000 were for telegrams.

[fol. 81] By the Court, Judge Bourquin:

"Q. Twelve thousand telephones used in the interstate there, and among them there were telephones used to telephone a message to the telegraph office?

"A. No, sir; they were used in interstate telegraph business.

"Q. They were used to telephone a telegram down to the telegraph office? You are including that in the interstate commerce?

"A. That is——

"Q. (After a pause by the witness.) Did you not just say so?

"A. Yes,—on the originating end.

"Q. Yes.

"A. I was just trying to get your question clear.

"Q. In other words, when you say you use 12,000 telephones at a time in interstate commerce, in that 12,000 you have included telephones by which John Smith or any one else sent a telegram to the telegraph office?

"A. Yes."

By Mr. Gunn:

"Q. Have you the number of telephones included in that?

"A. Yes, there were 2,000 of those in the first, and 369 in the second group."

Eliminating the charge for those used in telegraphing messages, over nine thousand would still remain actually used in interstate telephonic communication.

Recross-examination:

Between 25 and 30 per cent of the originating toll reve-[fol. 82] nues—that excludes telegrams—is interstate. The toll rates are established regardless of whether they are interstate or intrastate. They are established on a board to board basis. None of that revenue that I speak of as inerstate business, or foreign business, comes from the monthly rate charged to customers. That is separate. That is, the monthly rate is charged the customer for local service.

"Mr. Matson: That is all.

"Mr. Gunn: That is all, your Honor.

"Mr. Matson: The defendants rest."

* * * * * * *

Upon stipulation the case was submitted for final decision on the showing made on the application for an interlocutory injunction.

* * * * * * *

The above and foregoing is all of the evidence introduced at the trial of said cause, and contains all proceedings had in the trial thereof necessary for a review of the ruling assigned as error on this appeal.

Wherefore the defendants and appellants pray that the above statement of evidence be settled, approved and allowed by the above entitled Court as a true, full and complete statement of all the evidence taken and given on the trial of said cause, for use on the appeal taken to the Supreme Court of the United States.

Dated at Helena, Montana, this 14th day of July, 1934.

Raymond T. Nagle, Attorney General, State of Montana; Enor K. Matson, Assistant Attorney General, State of Montana, Solicitors for Defendants and Appellants.

[fols. 83 & 84] Service of the foregoing proposed Statement of Evidence admitted and receipt of a copy thereof acknowledged this 14th day of July, 1934.

Gunn, Rasch, Hall & Gunn, Milton Smith, Jr., J. R. Turnquist, Solicitors for Plaintiff and Appellee.

[File endorsement omitted.]

[fol. 85] In United States District Court

[Title omitted]

Stipulation as to Transcript of Record—Filed Aug. 3, 1934

It is hereby stipulated and agreed by and between Milton Smith, Jr., J. R. Turnquist, Denver, Colorado, and Gunn, Rasch, Hall and Gunn, Helena, Montana, Solicitors for Plaintiff and Appellee, and Raymond T. Nagle, Attorney

General, and Enor K. Matson, Assistant Attorney General, Solicitors for Defendants and Appellants, that the papers of record which shall constitute the transcript of record on appeal to the Supreme Court of the United States herein, shall consist of the following:

1. Bill of Complaint;
2. Joint Answer;
3. Written opinion by Judge Bourquin;
4. Written dissenting opinion by Judge Garrecht;
5. Findings of Fact, Conclusions of Law and Decree;
6. Petition for Appeal;
7. Assignment of Errors and Prayer for Relief;
8. Statement of Basis of Appellate Jurisdiction;
9. Order allowing Appeal;
10. Citation on Appeal;
11. Statement under Paragraph 3, Rule 12 and Service Thereof;

[fol. 86] 12. Statement of Evidence as allowed, approved and settled;

13. Stipulation re Approval Statement of Evidence;
14. Order approving Statement of Evidence;
15. Stipulation as to Transcript of Record;

and the Clerk of the above entitled Court is requested to forward to the Clerk of the Supreme Court of Washington, D. C., only the papers designated herein.

This stipulation is made and entered into pursuant to Rule 10 of the Supreme Court of the United States.

Dated this 25 day of July, 1934.

Milton Smith, Jr., J. R. Turnquist, Gunn, Rasch, Hall & Gunn, Solicitors for Plaintiff and Appellee. Raymond T. Nagle, Attorney General; Enor K. Matson, Assistant Attorney General, Solicitors for Defendants and Appellants.

[File endorsement omitted.]

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 88] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Oct. 13, 1934

Come now the appellants in the above entitled cause and adopt their Assignment of Errors as their statement of the points to be relied upon, and state that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Helena, Montana, August 3rd, 1934.

Raymond T. Nagle, Attorney General; Eward K. Matson, Assistant Attorney General, Solicitors for Appellant.

Service of the above and foregoing statement is hereby [fols. 88 & 90] admitted and receipt of a copy thereof acknowledged this 3rd day of Aug., 1934.

Milton Smith, Jr., J. R. Turquist, Gunn, Rasch, Hall & Gunn, Solicitors for Appellee.

[fol. 91] [File endorsement omitted.]

Endorsed on cover: File No. 39,051. D. C. U. S., Montana. Term No. 423. Frank H. Cooney, as Governor of the State of Montana, et al., etc., Appellants, vs. The Mountain States Telephone and Telegraph Company. Filed September 27, 1934. File No. 423, O. T., 1934.